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77-838

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

See
~~NO.~~ 77-595

U. S. INDUSTRIES, INC.,
~~Petitioner~~
Respondent

v.

JOHN D. PAGE and DON THOMAS,
~~Respondents~~
Petitioner

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OCTOBER TERM, 1977

NO. 77-595

U. S. INDUSTRIES, INC.,
Petitioner,

v.

JOHN D. PAGE and DON THOMAS,
Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents, John D. Page and Don Thomas, respectfully pray that a writ of certiorari issue to review the decision entered on July 25, 1977 by the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The orders of the United States District Court for the Southern District of Texas are reprinted in Appendix A, Appendix B, Appendix C and Appendix D of Petitioner's Petition for Writ of Certiorari. The opinion of the Court of Appeals for the Fifth Circuit is reported

at 556 F.2d 336 and is reprinted in Appendix E of Petitioner's petition. The judgment of the Fifth Circuit is reprinted in Appendix F and the Notice of Order on the Petition for Rehearing is reprinted in Appendix G of Petitioner's Petition for Writ of Certiorari.

JURISDICTION

The judgment of the Court of Appeals herein was entered on July 25, 1977. Petitioner's Petition for Rehearing was denied on September 13, 1977. This Cross-Petition for Writ of Certiorari is filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the decision of this Court in *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), holding that the timely filing of a charge of employment discrimination with the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964 does not toll the running of the period of limitations applicable to an action under 42 U.S.C. §1981, should be applied retroactively.

STATEMENT OF THE CASE

Respondent John D. Page filed a charge of discrimination with the Equal Employment Opportunity Commission (hereinafter "EEOC") on April 23, 1969 alleging that Petitioner had discriminated against him because of his race. On May 21, 1974 the EEOC issued a "Notice of Right to Sue" form to Respondent's attorney, and on August 14, 1974 the Complaint initiating this cause of

action was filed. The Complaint alleged that Respondents were entitled to recovery on the basis of two statutes—Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.* (hereinafter "Title VII"), and 42 U.S.C. §1981 (hereinafter "§1981").

On June 16, 1975 the District Court dismissed Respondents' §1981 cause of action with respect to any alleged illegal acts which occurred more than two years prior to the filing of the Complaint (Appendix A of Petition, p. 15). On Respondents' Motion to Reconsider on October 8, 1975, the District Court reinstated Respondents' §1981 claim and held that this Court's decision in *Johnson v. Railway Express Agency, Inc., supra,* should not be given retroactive effect (Appendix B of Petition, p. 17). On June 4, 1976 the District Court denied Petitioner's Motion to Reconsider and reaffirmed its previous holding that *Johnson* should not apply retroactively (Appendix C of Petition, p. 20). Thereafter, on June 30, 1976, the District Court certified the issue for an interlocutory appeal (Appendix D of Petition).

The Fifth Circuit, on July 25, 1977, reversed the District Court with respect to Respondents' §1981 cause of action holding that *Johnson* is to be given retroactive effect and that accordingly the §1981 claim must be dismissed insofar as it relates to any acts alleged to have occurred more than two years before the filing of suit in federal court (Appendix E of Petition, p. 41).

REASONS FOR GRANTING THE WRIT

In *Johnson v. Railway Express Agency, Inc.*, this Court held that the filing of a Title VII claim with the EEOC does not toll the limitation period within which to file

a civil action under §1981. Prior to that decision the United States Courts of Appeals were split on the issue. The Fifth Circuit and the District of Columbia Circuit had unequivocally held that the statute of limitations for the §1981 claim would be tolled by the filing of the EEOC charge. *See Guerra v. Manchester Terminal Corporation,* 498 F.2d 641, 648 (5th Cir. 1974); *Macklin v. Spector Freight Systems, Inc.,* 478 F.2d 979, 994-96 (D.C. Cir. 1973); *Boudreaux v. Baton Rouge Marine Contracting Company,* 437 F.2d 1011, 1017 (5th Cir. 1971). The District Court for the Eastern District of Virginia had aligned itself with the Fifth Circuit and the D.C. Circuit on this question. *Reynolds v. Daily Press, Inc.,* 5 EPD ¶7991 (E.D. Va. 1972). On the other hand, the Sixth Circuit had adopted the opposing view that the filing of the EEOC charge did not toll the limitations period for the filing of a §1981 cause of action. *Johnson v. Railway Express Agency,* 489 F.2d 525 (6th Cir. 1973). The District Court for Delaware supported the Sixth Circuit's holding. *Jenkins v. General Motors Corp.,* 354 F. Supp. 1040 (D. Del. 1973).

In addition to the question of the tolling of the limitatons periods for a §1981 claim, there was much confusion in the lower courts, prior to this Court's decision in *Johnson,* as to whether §1981 gives rise to a cause of action separate and apart from a Title VII cause of action. The Seventh Circuit, in *Waters v. Wisconsin Steel Wks. of Internat'l Harvester Co.,* 427 F.2d 476, 487 (7th Cir. 1970), *cert. denied,* 400 U.S. 911 (1971), had held that a plaintiff could only sue directly under §1981 if he showed a reasonable excuse for failing to exhaust EEOC remedies. The District Court for Colorado dismissed §1981 suits in which the plaintiff was unable

to show that relief was first sought from the EEOC. *Allen v. Pipefitters, Local 208,* 4 FEP 1229 (D. Colo. 1972; *Taylor v. Safeway Stores, Inc.,* 333 F. Supp. 83, *rev'd in part,* 524 F.2d 263 (10th Cir. 1975).

This Court's decision in *Johnson* was one of great importance in defining the relationship between §1981 and Title VII. However, because of the number of plaintiffs who have justifiably relied on these pre-*Johnson* holdings by lower federal courts, the issue of whether *Johnson* should have retroactive effect is of equal importance. As stated above the pre-*Johnson* precedent in the Fifth Circuit and the District of Columbia Circuit was clear that a plaintiff's §1981 cause of action would not be considered untimely if the plaintiff filed a charge with the EEOC and waited until some action had been taken by the EEOC before bringing a court suit. Plaintiffs within the Seventh Circuit could not even file a §1981 suit until they had first exhausted Title VII administrative proceedings. *Waters, supra.* The question of retroactive application of *Johnson,* affects the many plaintiffs who filed combined §1981 and Title VII suits in these jurisdictions. In estimating the number of persons affected by this question, it must be remembered that many of these plaintiffs, like Respondents, seek to represent not only themselves but others similarly situated and accordingly have filed their suits as class actions.

In giving *Johnson* retroactive effect in the instant case the Fifth Circuit relied on its previous holding in *Williams v. Phil Rich Fan Mfg. Co., Inc.,* 552 F.2d 596 (5th Cir. 1977) (Appendix E of Petition, p. 41). The Fifth Circuit's decision in *Phil Rich Fan* was based on an incorrect application of the criteria established by this Court to

analyze whether or not retroactive effect should be given to a newly announced judicial rule.

This Court has established three criteria to be used in any in-depth analysis of an issue of retroactivity. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-7 (1971): (a) whether a new principle of law was established, "either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . ." *Chevron, supra* at 106; (b) whether retrospective operation will further or retard the purpose of the rule, *Chevron, supra* at 107; and (c) whether substantial inequitable results would follow if the new rule is applied retroactively. *Id.*

In *Phil Rich Fan*, the Fifth Circuit cited the above criteria but failed to apply them correctly. As to the first criteria, the Fifth Circuit found that, at least as to the previous law of that circuit, *Johnson* had established a new principle of law and had overruled "clear past precedent." *Phil Rich Fan, supra* at 599. The Fifth Circuit then added its own twist to the *Chevron* criteria. Citing its previous opinion in *Matter of S/S Helena*, 529 F.2d 744 (5th Cir. 1976), the Court stated that "in deciding whether civil rules should be applied retroactively we think that the purpose of the rule should be given greater weight than the extent to which the parties relied on the law that existed before that rule was announced." *Phil Rich Fan, supra* at 600. Nowhere has this Court indicated that the *Chevron* criteria are to be accorded different rather than equal weight in deciding a retroactivity issue. The Fifth Circuit then found that one purpose of the no-tolling *Johnson* rule

is to bar stale claims (as it is in every case involving a statute of limitations). Applying its *own* conclusion that the purpose of the new rule of law criteria should be given the most weight, the Fifth Circuit then quickly concluded that *Johnson* should be given retroactive effect without giving any significant consideration to the two remaining *Chevron* criteria. This constituted an erroneous application of the *Chevron* decision.

Clearly, a more sensible and correct application of the *Chevron* criteria was accomplished by the District Court for the Southern District of Texas in *Bush v. Wood Brothers Transfer, Inc.*, 398 F. Supp. 1030 (S.D. Tex. 1975). The District Court in *Bush* concluded, as did the Fifth Circuit that the first *Chevron* criteria was satisfied by *Johnson*. *Johnson* overturned clear precedent and was a case of first impression. However, thereafter, the District Court recognized that the purpose of *Johnson* was not merely to bar stale claims but to encourage plaintiffs to use every avenue of relief.[1] *Bush, supra* at 1032. A retrospective application of *Johnson* which will bar many §1981 causes of action will thus thwart a significant purpose of *Johnson* by closing an avenue of relief to plaintiffs who justifiably relied on previous law. As for the third criteria, it cannot be denied that extreme inequity will result from a retroactive application of *Johnson* since neither Respondents nor other plaintiffs could have foreseen this shift in the law.

Thus, in *Bush*, the District Court, correctly applying the criteria established by this Court, reached a con-

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1. The Tenth Circuit has also recognized that a primary purpose of *Johnson* was to establish §1981 as distinct and independent from Title VII. See *Taylor v. Safeway Stores Incorporated*, 526 F.2d 263, 274 (10th Cir. 1975).

clusion opposite to that of the Fifth Circuit and held that *Johnson* should not be applied retroactively. The Court of Appeals was in error holding otherwise and in dismissing Respondents' §1981 cause of action. The issue of retroactivity faced by this Court in *Chevron* also dealt with a statute of limitations application. *Chevron* decided, for the first time, that state law, rather than federal law determines the timeliness of actions arising from injuries occurring on fixed structures on the Outer Continental Shelf. Although one purpose of all limitations periods is to bar stale claims and any prospective application of a new limitations rule would thwart such a purpose, this Court in *Chevron* recognized that another overriding purpose was involved. In that case, a primary purpose in using state law "was to aid injured employees by affording them comprehensive and familiar remedies." *Chevron, supra* at 107-08. Such a purpose would clearly have been thwarted by applying the new periods of limitations rule retroactively so this Court held that it was to apply prospectively.

An analogous situation appears in the instant case. A primary underlying purpose of this Court's *Johnson* holding was to establish §1981 as a remedial route in employment discrimination cases separate and independent from Title VII. However, just as a retroactive application in *Chevron* would have thwarted a basic purpose of that new rule, a retroactive application of *Johnson* thwarts the purpose of establishing §1981 as an independent cause of action. The indepedence of §1981 is not merely a procedural independence from the EEOC prerequisites attached to Title VII. The remedies available under Title VII, at least as to seniority relief, have

been limited by a statutory provision in Title VII. See *International Brotherhood of Teamsters v. United States*, ____U.S.____, 97 S.Ct. 1843 (1977). The remedies under §1981 in this area have not been so limited. *Johnson's* no tolling rule should not be applied retroactively so as to deny Respondents, and other plaintiffs, an independent cause of action under §1981 with attendant independent remedies.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned authority, hereby certify that on this _____ day of December, 1977, three (3) copies of the foregoing Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been served upon all counsel of record, below listed, by depositing same in the United States Mail, postage prepaid.

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-838

JOHN D. PAGE and DON THOMAS,
Petitioners,

v.

U. S. INDUSTRIES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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---

BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 556 F.2d 356 and is reprinted as Appendix E of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in No. 77-595 heretofore filed with this Court. The opinions of the United States District Court for the Southern District of Texas are reprinted as Appendices A, B, C and D of the same Petition.

JURISDICTION

As set out below in Reasons for Denying the Writ, Petitioner has failed to satisfy the jurisdictional requirements of 28 U.S.C. § 2101(c) and accordingly, jurisdiction over this Petition for a Writ of Certiorari does not exist.

QUESTIONS PRESENTED

1. Whether Petitioner has satisfied the jurisdictional requirements of 28 U.S.C. § 2101(c) and the Rules of the Court for filing a Petition for a Writ of Certiorari.

2. If so, whether the decision of this Court in *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), holding that the filing of a charge of employment discrimination with the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, does not toll the running of the statute of limitations applicable to an action under 42 U.S.C. § 1981, was properly given retroactive effect by the court of appeals.

STATEMENT OF THE CASE

This Petition for a Writ of Certiorari relates soleiy to one part of a decision of the court of appeals rendered on July 25, 1977. The court of appeals had accepted an interlocutory appeal to review an order of the district court which held that Petitioner John D. Page's alleged Title VII action could be maintained even though it was not filed within the statutory 90-day period and that the limitations period applicable to Petitioners' cause of

action under 42 U.S.C. § 1981 was tolled by the filing of a charge of discrimination under Title VII despite this Court's decision in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975). The court of appeals rendered its decision on July 25, 1977, reversing the district court and holding that the *Johnson* decision was applicable to the instant case and that Petitioners' cause of action under 42 U.S.C. § 1981 was limited to allegations of occurrences or events which occurred within the applicable limitations period (two years) prior to the filing of Petitioners' complaint in district court. It is from this holding by the court of appeals that Petitioners seek a Writ of Certiorari.

In a separate part of its decision, the court of appeals affirmed the district court and held that Petitioner John D. Page could maintain a Title VII action based upon a charge of discrimination filed in April, 1969, even though Petitioners' complaint was not filed within the 90-day period set out in Title VII, 42 U.S.C. § 2000e-5(f)(1). Respondent herein filed a timely petition for rehearing and suggestion for rehearing en banc of that part of the decision of the circuit court. Respondent's motion was denied and Respondent filed a timely Petition for Writ of Certiorari, Docket No. 77-595, as to that part of the decision.

REASONS FOR DENYING THE WRIT

I.

Petition for Writ of Certiorari Not Timely

The time period for filing a petition for a writ of certiorari in a civil action, as mandated by Congress, is set

out in 28 U.S.C. § 2101(c). That statutory provision establishes a period of 90 days from the entry of judgment or decree in a civil action in which a petition for a writ of certiorari must be filed. As reflected by Appendices E and F to the Petition for a Writ of Certiorari in No. 77-595 and as conceded by Petitioners in the instant Petition, the court of appeals entered its decision reversing the district court with respect to Petitioners' § 1981 cause of action on July 25, 1977.

The July 25, 1977 decision of the circuit court pertaining to the parties involved in this petition for a Writ of Certiorari was divided into two parts. Part A of the decision related solely to the timeliness of the filing of Petitioner John D. Page's Title VII action. Part B of the decision related solely to the limitations period applicable to Petitioners' § 1981 cause of action. Part A (the Title VII issue) was decided favorably to Petitioners herein while Part B (the § 1981 issue) was decided unfavorably to Petitioners herein. Respondent filed a timely Motion for Rehearing as to Part A (the Title VII issue) of the decision of the court of appeals and, following denial of that motion, filed a timely Petition for a Writ of Certiorari to review that portion of the decision of the court of appeals. Petitioners herein never filed a Motion for Rehearing of Part B (the § 1981 issue) of the decision of the court of appeals nor did Petitioners seek an extension of time in which to file a Petition for a Writ of Certiorari to seek review of Part B of the decision of the court of appeals.

It is axiomatic that where a decision of an appellate court contains two or more parts, the time for filing a Petition for a Writ of Certiorari on one part runs independently from the other parts of the decision. *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952). The Petitioners now seek a Writ of Certiorari to review Part B of the decision of the court of appeals rendered on July 25, 1977 and the time for filing such a writ expired on October 24, 1977, almost two months before Petitioners filed this Petition. This Court should deny Petitioner's Petition for Writ of Certiorari as failing to satisfy the jurisdictional requirements for filing the petition.

II.

There is No Conflict Among the Circuits

Petitioners seek a Writ of Certiorari to review that part of the court of appeals' decision which held that this Court's decision in *Johnson v. Railway Express Agency, Inc., supra,* was to be applied to cases pending at the time that decision was rendered. In *Johnson* this Court held that § 1981 created a separate and independent cause of action from Title VII and that the limitations period applicable to a § 1981 cause of action could not be tolled by the filing of a charge of discrimination under Title VII. Petitioners assert that the court of appeals was in error in giving retroactive application to the *Johnson* decision. Petitioners further assert that the court of appeals was in error in its application of the criteria set out in *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971), in reaching its conclusion that *Johnson* was applicable to cases pending at the time that decision was rendered.

The court of appeals carefully considered the criteria established by this Court in *Chevron Oil Co. v. Huson, supra,* in concluding that *Johnson* was to be given retro-

active application in its prior decision in *Williams v. Phil Rich Fan Mfg. Co.*, 552 F.2d 596 (5th Cir. 1977). See, also, *Cutliff v. Greyhound Lines*, 558 F.2d 803 (5th Cir. 1977); *Dupre v. Hutchins Bros.*, 521 F.2d 236 (5th Cir. 1975). Petitioners erroneously assert that the *Chevron* criteria are weighed or balanced against each other in arriving at a conclusion as to whether or not a decision is not to be given retroactive application. *Chevron* makes it clear that all three criteria must be satisfied before a decision will not be given retroactive application. The court of appeals properly concluded that the purpose of the *Johnson* decision would not be furthered by withholding retroactive application and correctly applied *Johnson* to cases then pending in the circuit.

Every other court of appeals which has been presented the issue has also concluded that *Johnson* is to be applied retroactively. *Cates v. Trans-World Airlines*, 561 F.2d 1064 (2d Cir. 1977); *King v. Seaboard Coast Line R.R. Co.*, 538 F.2d 581 (4th Cir. 1977); *Patterson v. American Tobacco Co.*, 535 F.2d 257 (4th Cir. 1976); *Green v. Carter Carburetor Co.*, 532 F.2d 125 (8th Cir. 1976). There is no conflict among the circuit courts nor with decisions of this Court as to the retroactive application of *Johnson*. As observed by the court in *Cates v. Trans-World Airlines, supra:*

> "The Supreme Court is well aware of how to avoid the effects of applying one of its rulings retroactively to the case at bar. Yet in *Johnson,* the Court chose to apply its ruling that § 1981 statutes of limitations are not tolled by timely filed EEOC charges to the facts at hand, despite its awareness that this would preclude petitioner there from obtaining any relief since his Title VII claims were also time-barred. 421 U.S. at 466." 561 F.2d 1064

The question as to retroactive application of *Johnson* was decided by this Court when it applied its decision retroactively and the courts of appeal have uniformly applied the decision retroactively. The Court should deny Petitioners' Petition for Writ of Certiorari as there is no conflict of decisions among the circuits. Rather, the circuits have uniformly applied the no-tolling principle announced in *Johnson* in the same manner this Court applied that principle in the *Johnson* decision.

CONCLUSION

For the foregoing reasons, Respondent submits that this Petition for Writ of Certiorari must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this _____ day of January, 1978, copies of the foregoing Brief of Respondent in Opposition were served upon Carol Nelkin, Nelkin & Nelkin, 5417 Chaucer, Houston, Texas 77005, Attorney of Record for Petitioners, and upon James R. Watson, Jr., Bray and Watson, 500 Texas Professional Tower Building, 608 Fannin Street, Houston, Texas 77002, Attorney of Record for International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers, AFL-CIO, and its affiliate Local 561 by depositing the same in the United States Mail, postage prepaid, certified, return receipt requested.

SAMUEL E. HOOPER

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---

REPLY BRIEF OF PETITIONERS

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---

REPLY BRIEF OF PETITIONERS

In its Brief in Opposition, Respondent U.S. Industries, Inc. questions the timeliness of this Cross-Petition for a Writ of Certiorari. Respondent alleges that Petitioners failed to satisfy the requirements of 28 U.S.C. § 2101(c) in that Petitioners did not file a Motion for Rehearing with the Court of Appeals, and the Petition was filed more than ninety (90) days from the decision of the Court of Appeals. Respondent's reliance on *Federal*

Trade Commission v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206 (1952), is misplaced. There, neither the Petitioner, nor the Respondent had filed a motion for rehearing with the Court of Appeals. Here, Respondent filed a timely Motion for Rehearing with the Court of Appeals. The filing by Respondent of its Motion for Rehearing suspended the finality of the judgment of the Court of Appeals. *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441, 445 (1974). Respondent's Motion for Rehearing was denied on September 13, 1977, and Petitioners timely filed this Cross-Petition for a Writ of Certiorari within ninety (90) days of that date. Accordingly, this Cross-Petition for a Writ of Certiorari is timely.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned authority, hereby certify that on this ____ day of January, 1978, three (3) copies of the foregoing Reply Brief of Petitioners has been served upon all counsel of record, below listed, by depositing same in the United States Mail, postage prepaid.

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